

Gary L. Stuart  
Miranda v. Arizona—From 1963 to 2004  
The Story of America's Right to Remain Silent

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Whether innate or acquired early in life, the desire to confess—to take responsibility for a perceived misdeed—is no doubt a deep-seated impulse in us all; perhaps we want, as Sartre suggests, to return the world to a “harmony of minds,” an agreement on the principles that bind us to the society in which we live. Why we wish to do this seems visceral, as immutable as physical law, and as basic to our sense of justice as the concept of right and wrong. The act of confession, it would seem, restores the world (and our psyches) to a state of balance: For every action, there must be an equal reaction—an eye for an eye, and a tooth for a tooth.

There is, however, a curious aspect to our impulse to confess. We feel that in the act of contrition resides an implicit covenant: If I confess, I will be forgiven by the authority with which I have formed this covenant, for in the confession itself I make restitution. Confess, and all will be forgiven—this is what the police interrogator conveys to the suspect. Not in so many words, but the message is there—in the tone of voice, in the proffered kindness of a cigarette or cup of coffee—and in truth the suspect will be forgiven by the cop, whose only real requirement for achieving harmony is the confession. For the higher authority, however, the admission of wrongdoing is not the end. The ancient god of retribution must be served; the wrongdoer must pay for what he did, with his wealth, his liberty, or his life.

But does he understand this? As he sits in the interrogation room and the hours pass, and the cop repeats the same unspoken message over and over—does he understand that this whole problem can end if he simply admits to the crime? Does the suspect always know, always remember, and always understand that what he says can be used against him in a court of law? Does the suspect know that he has the legal right to remain silent and to refuse to answer the interrogator's questions? Do we as a society have the obligation to make sure he knows, understands, and does not forget?

The answers to these questions may seem self-evident today, but before the United States Supreme Court handed down Miranda v. Arizona, our system of justice operated under a different set of assumptions. Prior to Miranda, a well-informed citizen might be aware of the constitutional protection against self-incrimination, but few understood that this protection extended beyond the courtroom. In a very real sense, most Americans—certainly most white, middle-class Americans—assumed that a suspect, once in custody, was most likely guilty, and that police interrogation could and should continue, in private, isolated from counsel, until the suspect confessed. In general, police held this conviction as well and saw no wrong in concealing the fact that the suspect's confession would be used to incriminate him, nor did they see any wrong in pandering to the suspect's desire to confess. Scarcely anyone outside the realm of psychology believed a man would confess to something he had not done. And even those who knew better could find comfort in the belief that such false confessions would easily be discovered and never used unscrupulously to convict an innocent man.

In the middle of the last century, however, American society began to change and, with that change, to question some deep-rooted assumptions about race, about gender, and about law. The war, to some extent, had desegregated the army, and returning black GIs, having fought for their country, could not

help but resent their lack of freedom at home. Then, too, the war effort had brought women into sectors of the workforce long reserved for men. Suddenly they were being asked to surrender their independence and pretend they could not handle a man's job.

Finally, in movies like *The Last Angry Man*, audiences were shown what can happen when juries make the lazy assumption that the accused must be guilty as charged. As the forces of change manifested in the struggle for civil rights and greater social and economic equity, there began a growing demand for higher education. Across the country, the university system expanded to include the children of lower- and middle-class parents, and to provide them the opportunity to enter professions that had been traditionally the province of the upper class—especially the professions of law and academe. As a new crop of lawyers and professors came of age, they pushed for egalitarian reforms, and for the first time, the state took on the responsibility of providing legal counsel for citizens who could not afford it. Soon thereafter, that right was extended to include pretrial procedures. But even so, the suspect had to invoke this right to have a lawyer present, and if he did not know he had the right, well, that was his fault.

Then one afternoon in March of 1963, a Phoenix police detective arrested a young, poor, and uneducated Hispanic man in connection with a series of sexual assaults. Within a few hours the man had willingly confessed to the crimes. His subsequent trials and convictions on two of the charges were swift and certain, and it seemed that, like so many others before it, the case would end there.

But there is, of course, more to this story. What happened that afternoon in the Phoenix police station began a chain of events that came to bear on a central precept of our system of justice, and upon a core belief of the American way of life. Ernesto Miranda was convicted of a crime not on the strength of eyewitness testimony or physical evidence, but almost entirely because he had incriminated himself without knowing it, and without knowing that he didn't have to.

Miranda v. Arizona stands as one of the most important events in the annals of American legal history. Although the case at first received virtually no attention from the media or the legal community, Miranda's lawyers, John P. Frank and John J. Flynn, were among the most prominent in the Arizona bar, and their work soon focused the entire country on the issue of Miranda's rights. A great many Arizona lawyers followed the story closely, ingesting the daily reading and discussing—arguing vehemently sometimes—the points of the case. Arizona was at that time a politically conservative, law-and-order state—the state of Barry Goldwater and John Rhodes. Sentiments against the lawyers representing Miranda ran high.

Just as high, however, ran the groundswell pushing for a true and universal recognition of civil liberties and a reinterpretation of that essential tenet of American justice, the right of all citizens to be treated equally under that law. Ernesto Miranda figures centrally in this story partly because he was an uneducated, ethnically disenfranchised citizen with virtually no voice to defend himself. But also, and even more important, he is central precisely because he was so obviously the perpetrator of the crimes for which he was arrested. For it is in cases when evidence and common sense so strongly dictate guilt—when all involved seem willing to waive rights set forth in our constitution—that the law must step forward to protect the presumed innocence of the accused and provide him the legal protection to which all innocent American citizens can lay claim.

This basic tenet had been invoked many times before Miranda, but never before had anyone drawn such a clear rationale from the various precedents, and never before had the argument been carried so eloquently before the Supreme Court. It is fair to say that the social and political climate of the day offered proponents of the Miranda Doctrine an environment receptive to their reasoning. Nevertheless,

without the dedication of those responsible, and if not for the unique combination of skills they possessed, the chance might have passed, and the course of American justice might have remained unaltered for an unknowable time.

Miranda represented a 1966 sea change in that the “totality of the circumstances” test for the admissibility of a confession was eschewed and a new bright-line was established by the now famous Miranda Warnings. The necessity for such a change came about because police interrogation techniques developed forty years ago specifically designed to induce suspects into unknowingly giving up their Fifth and Sixth Amendment rights.

The Dickerson decision in 2000 cemented that change by declaring that the Miranda warnings were not simply judicially created rules that protected constitutional rights but were themselves mandated by the Constitution.

The sad truth is that forced or coerced confessions were commonplace in rural America before the Miranda decision and were usually the product of unprofessional police conduct, which by definition, was often difficult to prove. Even when it could be proved, it took a lawyer to prove it. As the late John P. Frank said, “[T]he right to counsel and the freedom not to be a witness against oneself are a shield by which our Constitution protects persons in our society from suffering the broken bodies, not merely of distant centuries but of today, broken bodies of persons whom some government seeks to compel to testify against themselves. The minimal safeguard against such abuses, a safeguard that has been demonstrably necessary in our own country, is to declare that no confession may be used unless it is clear that it was made by a person who knew his constitutional rights and chose to waive them.”

History was made again in 2004 when the Supreme Court handed down several cases expanding the Miranda doctrine in domestic criminal cases and expanding the right to access and counsel to suspects apprehended in the ongoing war against terrorism. The domestic cases dealt with new police interrogation techniques that were designed to produce confessions by avoiding the strictures set down in Miranda. The terrorist cases dealt with the right to access to American courts for both citizens and non-citizens alike.

Yarborough v. Alvarado affirmed Miranda’s basic promise of protection of Fifth Amendment rights but carefully distinguished pre-custody situations in juvenile cases. While affirming a criminal conviction obtained through an unwarned confession, the court enunciated for the first time that the Constitution does not require special consideration given to age when deciding whether to grant or withhold Miranda warnings.

Fellers v United States produced a rare unanimous Supreme Court decision that suppressed a suspect’s in-custody confession after he had been read and had waived his Miranda rights. His “warned” confession in the police station was suppressed because it came from an earlier confession taken by the same officers at the defendant’s home. The police had gone to the suspect’s home for the express purpose of arresting him pursuant to an indictment in a drug case. While at his home, without reading him his rights and knowing that he was already represented by counsel on the drug charge, the officers engaged him in a conversation in which he incriminated himself. The court held that the second confession must be suppressed because it was the “fruit” of the first confession and thus a violation of both Fifth and Sixth Amendment rights.

United States v. Patane tested the admissibility of physical evidence obtained by the police as a result of an unwarned confession. In this instance, the police had “accidentally” violated Patane’s Miranda rights. The suspect had been arrested and interrogated at home and admitted possessing a gun in violation of his parole status. The Court ruled that prosecutors may use physical evidence against a suspect even if

it was obtained by officers who had not given the suspect a Miranda warning. A narrow plurality of Court stated that the Miranda rule could not be violated unless the statements were introduced in court. In this case, only the gun was admitted, not the suspect's actual statements.

Missouri v. Seibert involved an "intentional" withholding of Miranda rights by police. The officers who arrested Patrice Seibert consciously elected not to inform her of her constitutional rights as part of a strategy to get the suspect to incriminate herself. Only after securing her first unwarned confession, did they read the Miranda Rights card to her. Having already confessed, she waived her rights and confessed a second time. The Court soundly denounced the intentional violation of Miranda and ordered both confessions stricken. The 5-to-4 vote against the strategy, in an opinion by Justice David H. Souter, was a "plurality" decision since the five justices in the majority did not fully agree on a single rationale for holding both confessions inadmissible. Justice Souter said, "Strategists dedicated to draining the substance out of Miranda cannot accomplish by training instructions what Dickerson held Congress cannot do by statute."

Thus in these domestic criminal cases, the court firmly continues to support the uniquely American right to remain silent, the more general right to be informed and the somewhat global right to be represented by counsel. The entry of foreign and domestic suspects in the war against terrorism brings an unpredictable consequence of Miranda's legacy. In the past few years, the notion that an individual should have a right to remain silent has spread from police stations in America to custodial interrogations of foreign nationals in foreign countries. The fact that no other country in the world requires its police to issue Miranda warnings, therefore creates a conundrum for the FBI and other American law enforcement agencies, for if a foreign suspect is Mirandized on foreign soil, in a nation that does not recognize the right to remain silent nor provide counsel in pretrial settings, then Miranda warnings are inherently misleading.

The larger question of the extent to which domestic Miranda rights should be respected on foreign soil or on American sovereign territory is the subject of three recent decisions handed down along with the domestic Miranda decisions in the last two days of the Court's October-2003 term.

In Rasul v. Bush, the Court held that non-citizen detainees held at the US Naval base at Guantanamo Bay, Cuba have a right to file habeas corpus petitions in federal courts to challenge the legality of their detention.

In Hamdi v. Rumsfeld, the Court clarified American citizen Yaser Hamdi's rights. Hamdi has been detained as an "enemy combatant" for two years without access to either courts or his lawyer. The court held that his detention was proper and may be continued but that he has a right to challenge the justification for his detention, i.e., his status as an enemy combatant, before a neutral decision maker.

In Rumsfeld v. Padilla, the Court held that Padilla—another American citizen being held as an enemy combatant—had filed his habeas petition in the wrong court. Presumably, when Padilla re-files his petition in the right court, he will be given the same rights as Mr. Hamdi.

The three cases involving the war on terrorism thus invite the comparison between the well known *Miranda* rights and what may become known as *Hamdi* rights.

The devastation inflicted upon New York City, and, psychologically, on the rest of the nation on September 11, 2001, understandably created a need for changes in the ways we prosecute foreign criminals such as the al Qaeda terrorists. What we see as constitutional rights for ourselves may have to be withheld from those who would take all rights away by terror and violence rather than by the due process of the democratic system. We would do well to remember, however, that, in the effort to solve the problems

Miranda has posed to law enforcement we return to the days when law enforcement was silent on the rights of suspects--be they homegrown simple thieves or foreign-trained terrorists--then those people seeking to destroy democracy itself and replace it with a radically fundamental theocracy will have obtained one of their objectives.

I believe Justice O'Connor is as close to these large questions as anyone could possibly be. Justice O'Connor is at the center of the court and the center of American thought when she says, as she did in the Hamdi case, "Striking the proper constitutional balance. . .is of great importance to the nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds so dear or to the privilege that is American citizenship."

June 4, 2004 was the last day of the Supreme Court's October-2003 Term. It was, as Anthony Lewis said in the New York Times, "As profound a day in the court as any in a long time." I think what he meant was the confluence of two kinds of rights: *Miranda* rights were, once again, constitutionally confirmed and *Hamdi* rights were, for the first time, constitutionally created.